CASE NO. 82-5519

IN THE

SUPREME COURT OF THE UNITED STATES

FLOYD MORGAN,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

SECTION 921.141, FLA.STAT., WAS NOT UNCONSTITUTIONALLY APPLIED TO PETITIONER NOR WAS THE JURY OR SENTENCING JUDGE RESTRICTED IN CONSIDERING EVIDENCE REGARDING THE CHARACTER OF THE DEFENDANT AS MITIGATING EVIDENCE.

THE SUPREME COURT DID NOT ERR IN UPHOLDING THE FINDING OF THE SENTENCER THAT THE HOMICIDE IN THIS CASE WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL AND THE JUDGMENT AND SENTENCE OF DEATH IS NOT CONSTITUIONALLY DEFECTIVE.

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PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved found on pages one and two of the petition. Respondent does not accept the Questions Presented, as stated by petitioner and has accordingly restated them.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as stated on pages two and three of the petition as being accurate to the extent stated. Additional facts relevant to a disposition of the issue presented will be included in the argument portion of the response as those facts bear upon the specific question to be decided.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED, OR IF GRANTED, WHY THE JUDGMENT AND SENTENCE SHOULD BE SUMMARILY AFFIRMED

I

SECTION 921.141, FLA.STAT., WAS NOT UNCONSTITUTIONALLY APPLIED TO PETITIONER NOR WAS THE JURY OR SENTENCING JUDGE RESTRICTED IN CONSIDERING EVIDENCE REGARDING THE CHARACTER OF THE DEFENDANT AS MITIGATING EVIDENCE.

Petitioner, citing to and quoting from *Cooper v. State*, 336 So.2d 1139 (Fla.1976), contends that Section 921.141, Fla. Stat., was unconstitutionally applied to him because the judge and jury were precluded from considering nonenumerated mitigating circumstances as required by *Lockett v. Ohio*, 438 U.S. 586 (1978). Petitioner also argues that Florida's Standard Jury Instructions also restricted the judge and jury in what could be considered.

Respondent submits that the petition is frivolous as a matter of law and that the writ of certiorari should be denied or, if granted, the judgment and sentence should be summarily affirmed.

Counsel for petitioner candidly acknowledges that he was allowed to introduce evidence of nonenumerated mitigating circumstances by the trial judge (Pet. at p. 6; Resp. App. pps 28-38) but urges ". . . the jury was not given proper instruction or guidance concerning what consideration they could give the evidence. . . ." What counsel for petitioner neglects to point out to this Court, however, is that counsel did not voice any objection to these instructions in accordance with Florida's rule of procedure which requires an individual to object ". . . before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. . .", Fla.R.Crim.P. 3.390(d), in order to raise the matter on appeal. See also: *McCaskill v. State*, 344 So.2d 1276 (Fla.1977). This omission is clear from respondent's appendix and was asserted by respondent on the direct appeal in the Florida Supreme Court. The Florida Supreme Court in its opinion did not address the alleged defects in the jury instructions given in this case and this Court, under *Webb v. Webb*, 451 U.S. 493 (1981), must assume the Florida Supreme Court did not reach this claim because it was not properly raised and presented in the trial court. *Webb v. Webb, supra*, n. 4 at 498. In other words, there is an independent and adequate state ground that pretermits a consideration of the federal claim by this Court. See also: *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Thus this Court has no jurisdiction to consider the alleged defects in the jury instructions.

Petitioner did properly assert in the trial court that §921.141, Fla.Stat., was unconstitutionally vague and overbroad because it does not adequately define to the jury what it is they are to consider as aggravating circumstances and mitigating circumstances (Resp. App. A, at p. 13). The trial judge rejected the argument because that had been rejected by both this Court and the Florida Supreme Court (Resp. App. A, at p. 13). Even though counsel successfully argued that under this Court's decisions in *Gregg v. Georgia*, 428 U.S. 153 (1976) he was ". . . allowed to

offer any and all mitigating circumstances that I might choose to argue to the jury in consideration of the penalty that they might advise on to the Court. . ." (Resp. App. A, at p. 14), and did in fact introduce and argue the existence of nonenumerated mitigating circumstances (Resp. App. A, at p. 14-17), 26-37, 53-69), the Florida Supreme Court decided petitioner's claim that §921.141, Fla.Stat., was unconstitutional because it allegedly restricted a consideration of the mitigating circumstances. The court in its opinion rejected the claim that §921.141 restricted the sentencer from considering mitigating circumstances to those enumerated in subsection (6)(a) through (g). The Court said:

> Appellant contends that section 921.141 is unconstitutional as applied to him because the judge and jury were precluded from giving proper consideration to the evidence he offered in mitigation of his crime. He argues that the procedure utilized at his sentencing trial pursuant to section 921.141 prevented the judge and jury from assigning the proper weight to his mitigating evidence and that this violated principles of the Eighth and Fourteenth Amendments developed in Lockett v. Ohio, 438 U.S. 586 (1978). We have specifically held, however, that section 921.141 and the procedure utilized thereunder are in keeping with the principles of Lockett. Songer v. State, 365 So.2d 696 (Fla.1978) (on rehearing), cert.denied, 441 U.S. 956 (1979).

415 So.2d at 11.

In *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert.denied*, 441 U.S. 956 (1979), the Florida Supreme Court rejected the identical argument raised herein, relying on *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert.denied*, 440 U.S. 976 (1979), and said:

> In *Lockett*, the Court held that Ohio's death penalty statute, which restricts the sentencing judge's consideration to the statutory list of mitigating factors, violates the eighth and fourteenth amendments to the United States Constitution. Appellant asserts that Florida's statute similarly prescribes an exclusive list of mitigating circumstances, relying principally on language from our decision in *Cooper v. State*, 336 So.2d 1133 (Fla.1976), to the effect that unlisted mitigating circumstances should not be considered in sentencing for a capital crime.
>
> In *Cooper*, this Court was concerned not with whether enumerated factors were being raised as mitigation, but with whether the evidence offered was probative. Chief Justice Burger, writing for the majority in *Lockett*, expressly stated that irrelevant evidence may be excluded from the sentencing process. 98 S.Ct. at 2965 n.12. Cooper is not apropos to the problems addressed in *Lockett*.

> *As concerns the exclusivity of the list of mitigating factors in Section 921.141, the wording itself, and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive.* This was noted, in fact, in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).
>
> We have approved a trial court's consideration of circumstances in mitigation which are not included on the statutory list in *Washington v. State*, 362 So.2d 658 (Fla.1978); *Buckrem v. State*, 355 So.2d 111 (Fla.1978); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla. 1976); *Meeks v. State*, 336 So.2d 1142 (Fla.1976); *Messer v. State*, 330 So.2d 137 (Fla.1976); and *Halliwell v. State*, 323 So.2d 557 (Fla.1975), among others. Obviously, our construction of Section 921.-141(6) *has been* that *all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered.* This construction of the statute, and its continued validity, were noted most recently in *Spinkellink v. Wainwright*, 578 F.2d 582, 620-21 (5th Cir.1978), where the court was presented with an identical challenge to our death penalty statute based on *Lockett v. Ohio*.

365 So.2d at 700. See also: *Spinkellink v. Wainwright, supra*, 620-621.

Of course, the Florida Supreme Court's construction of §921.141, which is consistent with this Court's interpretation of it in *Proffitt v. Florida*, 428 U.S. 242 (1976) is binding. *Wainwright v. Stone*, 414 U.S. 21 (1973).

The claim that the statute was unconstitutionally applied to petitioner is utterly without merit as a matter of fact. *Cooper v. State*, 336 So.2d 1133 (Fla.1976) to the contrary notwithstanding, the record demonstrates that the petitioner, just like Mr. Spinkellink, was afforded, and exercised, without limitation, every opportunity to set forth any and all mitigating factors which he wanted to introduce. (Resp. App. A, p. 28-37). These included a letter from his mother stating he suffered an injury when he was a child, that he served in Vietnam ten years earlier and that he suffered a head injury requiring hospitalization in 1969 (Resp. App. A, p. 29-30); a letter from a psycologist concerning his evaluation of petitioner that demonstrated his potential for rehabilitation through therapy (Resp.App. A, p. 28-29); a request by petitioner

that he be given vocational training and educational opportunities (Resp. App. A, p. 30-31); a letter from Alcoholics Anonymous indicating petitioner's successful performance in that program (Resp. App. A, p. 32); a copy of petitioner's Reclassification and Progress Report showing he presented no disciplinary problems as of 1972 and that his prognosis at that time was good (Resp. App. A, p. 32-33); a copy of Certificate of Achievement issued prior to the homicide opining that petitioner that ". . . possibly, after intensive therapy, he would not be a menace to society upon release. . ." (Resp. App. A, p. 34); a psychological evaluation of petitioner dated December 3, 1975, showing psycological deficiencies (Resp. App. A, p. 35-36); a Reclassification and Progress Report issued in September 1976 showing successful educational achievement and recommending that his custody be reduced to minimum (Resp.App. A, p. 36); and a letter from the then Governor of the State of Florida commending petitioner for his actions several years earlier in response to a prison disturbance which prevented further injury to institutional personnel (Resp. App. A, p. 36-37).

As could be expected counsel argued these factors to the jury in mitigation (Resp.App. A, p. 54-70). He also argued that the death penalty was not a deterent and retribution should not be considered (Resp. App. A, p. 55). Indeed counsel told the jury, without objection by the State, that ". . . you are the only ones to decide mitigation in this case, mitigation in whatever form you find it. . ." (Resp. App. A, p. 63).

There is simply no support for petitioner's claim that §921.141, Fla.Stat., as it was applied to him, limited the introduction of nonenumerated mitigating circumstances for the sentencer's *consideration* in violation of *Lockett v. Ohio, supra.*

Even if this Court were to consider the unpreserved challenge to the jury instructions, petitioner cannot prevail. The instructions to the jury given in this case track the language of

the *statute*, and amplify the definition of "especially heinous, atrocious or cruel" (Resp. App. A, p. 71-76). If the instructions track the statute, under *Proffitt* itself, they do not restrict consideration of factors in mitigation. The Supreme Court of Florida has so held in a number of cases. *Demps v. State*, 395 So.2d 501 (Fla.1981); *Peek v. State*, 395 So.2d 492 (Fla.1980) and *Songer v. State, supra*. The instructions, as reflected by the record, quite accurately told the jury that the *aggravating* circumstances they could consider were *limited* to those listed; did not tell them they were limited as to what could be considered as mitigating evidence; and that ". . . if one or more aggravating circumstances are established, you should consider *all the evidence* tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed. . ." (Resp. App. A, p. 74-75).

Should this Court conclude a substantial federal question has been presented then respondent submits it should grant the writ and summarily affirm on the basis of the record and the authorities cited herein.

II

THE SUPREME COURT DID NOT ERR IN UPHOLDING THE FINDING OF THE SENTENCER THAT THE HOMICIDE IN THIS CASE WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL AND THE JUDGMENT AND SENTENCE OF DEATH IS NOT CONSTITUTIONALLY DEFECTIVE.

Petitioner, citing to *Demps v. State, supra*, and this Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980), contends his sentence of death is unconstitutional because the finding that the homicide was "especially heinous, atrocious and cruel in this case is contradictory to the finding in an unrelated case not before this Court and thus arbitrary and capricious.

Respondent submits petitioner is incorrect both in fact and in law and that, even if the Supreme Court was wrong in upholding the finding, the judgment and sentence would not be invalid under the Constitution of the United States.

In the instant case the victim was stabbed to death in a darkened cell. He was *repeatedly* stabbed--ten times to be exact. The physical and documentary evidence was such that the jury could infer that the initial assault was unsuccessful and merely awakened the victim. That evidence also permitted the jury to infer the victim attempted to ward off the lethal blow. This was in fact argued to the jury by the prosecutor (Resp.App. B, p. 1-3). Thus there was evidence to support a conclusion the victim had cognition of impending death. The Florida Supreme Court has repeatedly held that homicides involving multiple stabbings can lawfully be classified as ". . . especially heinous, atrocious and cruel. *Miller v. State*, 332 So.2d 65 (Fla.1976); *Funchess v. State*, 341 So.2d 762 (Fla.1976); *Washington v. State*, 362 So.2d 658 (Fla.1978); *Foster v. State*, 369 So.2d 928 (Fla.1979), the latter two cases being cited to by the Florida Supreme Court in upholding the finding; *Rutledge v. State*, 374 So.2d 975 (Fla. 1979); *Booker v. State*, 397 So.2d 910 (Fla.1981); and *Straight v. State*, 397 So.2d 903 (Fla.1981). *Demps v. State, supra*, is the only case where the Florida Supreme Court has overruled a finding of heinous, atrocious and cruel where multiple stabbing was the method employed by the perpetrator and that decision is obviously wrong. The Court in overruling the sentencer's finding in *Demps* cited to *Cooper v. State, supra*, which like *Godfrey* involved instaneous death by a single gunshot where the victim was unaware of impending death or the likelihood that such would occur. That is inopposite to the instant case.

Respondent submits that petitioner is actually arguing that since he has shown this Court a case where the Supreme Court of Florida has rejected a finding under similar facts, his constitutional rights have been violated. This is patently incorrect

for this Court has repeatedly rejected this legal claim. *Howard v. Kentucky*, 200 U.S. 164 (1906); *Milwaukee Electric Railway & Light Co. v. Wisconsin*, 252 U.S. 100 (1920) and *Beck v. Washington*, 369 U.S. 541 (1962).

In *Howard*, this Court clearly held:

> ". . . a 'state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. . .'"

200 U.S. at 173.

Of more importance, this Court in *Beck v. Washington*, *supra*, where the petitioner specifically alleged a misapplication of state law--the claim presented herein--denied him equal protection of the law guaranteed by the Constitution, said:

> . . . petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . .

citing to *Milwaukee Electric*, *supra*, 369 U.S. at 555. In other words, the mere fact that a tribunal reaches different conclusions[1] in two different cases does not establish a denial of equal protection, unless there is shown an element of intentional or purposeful discrimination. *Delia v. Court of Common Pleas of Cuyahough County*, *supra*, at 206; cf. *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978) at 602-606, citing to *Provence v. State*, 337 So.2d 783, 787 (Fla.1976) wherein the Florida Supreme Court recognized reasonable persons can differ on legal conclusions.

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1 It should be noted that in *Dempa* while the aggravating circumstance was found not supported by the evidence the ultimate sentence of death was *sustained* meaning both killers received equal punishment.

Respondent submits the only permissible federal question that petitioner can raise is whether a rational trier of fact could lawfully conclude the homicide in this case was "especially heinous, atrocious or cruel." *Godfrey v. Georgia, supra; Jackson v. Virginia,* 443 U.S. 307 (1979).

As has been noted this case is totally unlike *Godfrey* because that involved an instantaneous death from a gunshot wound and the prosecutor acknowledged the crime did not involve either torture or physical injury preceding the death of the victim. Moreover, in *Godfrey* there was no instructions amplifying the general terms of the particular aggravating circumstance. In the instant case the death was not instantaneous, the prosecutor argued the crime was "especially heinous, atrocious or cruel" (Resp.App. A, p. 43) as those terms have been defined, and the trial judge explicitly gave an extended definition of these terms (Resp.App. A, p. 72-73) as in *State v. Dixon,* 283 So.2d 1 (Fla.1973) which was approved by this Court in *Proffitt v. Florida, supra,* at 255, n. 12. The nature of the homicide and the circumstance under which it was committed when viewed in the light most favorable to the prosecution was such that a rational sentencer could lawfully conclude that it was "especially heinous, atrocious and cruel" and this Court, if it determines a federal question is presented, should grant the writ and summarily affirm the judgment and sentence.

Even if the evidence does not support the finding, the judgment and sentence would still not be defective from a constitutional standpoint. There is no question but that the trial judge found three enumerated aggravating circumstanaes were established by the evidence and that no mitigating circumstances existed. Therefore the death penalty is constitutionally appropriate even if the one finding is legally erroneous. *Demps v. State, supra; Brown v. State,* 381 So.2d 690 (Fla.1981) and *Williams*

v. Maggio, 679 F.2d 381 (5th Cir.1982) en banc. In *Maggio*, the Court refused to declare a death sentence unconstitutional grounded upon the fact that it found the evidence was insufficient to support one of the aggravating circumstances found by the jury because there was evidence to support at least one other aggravating circumstance. 679 F.2d at 388-390.

Petitioner's death sentence under either view is not constitutionally infirm and therefore this Court should either deny the writ of certiorari or grant the same and summarily affirm.

CONCLUSION

Respondent respectfully submits that the petition fails to state any substantial federal question meriting further review by this Court. To the extent that the Court concludes otherwise, the State of Florida submits that the decision rendered by the Florida Supreme Court in this cause is clearly correct; that this Court should deny plenary review; and, that it should summarily affirm the decision of the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 1st day of November 1982.

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